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JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 950

ELIZA JANE DOBY AND J. LILLIAN DOBY,
Petitioners,

v.

R. L. BROWN, JR., JOHN S. MORRIS, JR., J. HEATH MORROW, CHARLES W. PICKLER, H. WELLS ROGERS, TED FURR, TRUSTEES OF THE ALBEMARLE CITY ADMINISTRATIVE UNIT, AND CLAUD GRIGG, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE ALBEMARLE CITY ADMINISTRATIVE UNIT,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Jurisdictional Statement

The petitioners herein, respondents below, seek to invoke the jurisdiction of this Court under Title 28, United States Code, Section 1257 (3) and have performed certain procedural details in apt time. Nevertheless, the respondents respectfully submit that the Petition for Writ of Certiorari should be denied for the following reasons:

(1) No federal question is involved and no questions of importance are presented which it is in the public interest to have decided by this Court.

(2) Questions raised involve only the State Constitution and laws passed on by the State Court adversely to the claim of the petitioners herein.

(3) No federal question was raised by the petitioners in the State Court, and the judgment of the State Court was not based on a federal question.

(4) Decisions relied on by the petitioners here are inapplicable in this cause and do not establish a right to the granting of the Writ.

Statement of Case

The action in the State Court in essence involves certain lands owned by the petitioners here, which the respondents condemned for a site for school purposes.

That the Court may clearly see that the petitioners seek only to prevent condemnation of their lands under the laws of the State of North Carolina rather than the protection of some right guaranteed by the Federal Constitution, facts other than those stated by the petitioners and hereinafter stated are considered essential.

Action to condemn 26.972 acres of the petitioners' lands was begun in the Superior Court of Stanly County, North Carolina, on October 2, 1954, when the respondents served notice on each of the petitioners pursuant to G. S. 115-85, now by amendment G. S. 115-125, advising them that the application required by said statute would be filed with the Clerk of the Superior Court on October 8, 1954, and serving on each of the petitioners a copy of the application which was to be filed.

On October 6, 1954, the petitioners commenced an action in the Superior Court of Stanly County alleging that the respondents had not been served with summons in the condemnation proceedings and that no negotiation for the purchase and sale of the property had been undertaken, obtain-

ing a temporary restraining order. The temporary restraining order was dismissed at the hearing to make the same permanent by Judge Francis O. Clarkson on October 13, 1954. Appeal was taken from Judge Clarkson's order but was not perfected. Demurrer in this action was filed by the respondent, and that action was terminated by judgment of voluntary nonsuit on February 19, 1955.

On November 20, 1954, the respondents issued summons in the State action and filed with the Court application to condemn the lands. The petitioners could not be located and found for personal service of summons, and summons was served by publication. *Brown* v. *Doby*, 242 N. C. 462.

On January 22, 1955, three days before the expiration of the time for answering as set out in the Notice of Publication, the petitioners entered a special appearance through their attorneys, asking dismissal of the proceeding for that jurisdiction over the person of the petitioners had not been acquired by the Court.

The motion to dismiss was denied by the Clerk on hearing and by the Superior Court Judge on appeal. From the orders denying dismissal of the action, the petitioners appealed to the Supreme Court of North Carolina, and the Court held in that appeal that the petitioners had been properly notified and served with process. (See *Brown* v. *Doby*, 242 N. C. 462.)

After judgment of the Supreme Court was certified to the Superior Court, this cause was placed on the calendar at the next term of court and was remanded by the Judge presiding to the Clerk to be proceeded in according to law.

On November 9, 1955, after the cause had been remanded to the Clerk, appraisers were appointed, after notice thereof to the petitioners.

After appraisers were appointed, the petitioners left in the office of the Clerk a paper writing purporting to be an

answer, which the Clerk refused to mark filed, the petitioners appealing to the Judge in term time from the action of the Clerk.

After leaving with the Clerk said purported answer, the petitioners made motion to transfer the cause to the civil issue docket for trial, which was denied and from which appeal was taken.

The next steps in the proceeding were the report of the appraisers, notice to the petitioners of hearing on the matter of confirming the report, the hearing, and the confirmation of the report of appraisers. The petitioners filed exceptions to the report of the appraisers and appealed to the Court in term time.

The entire matter came on for hearing before his Honor Frank M. Armstrong, Judge Presiding, and a jury, at the February 1956 Civil Term of Superior Court for Stanly County, and he permitted the petitioners to file their answer.

The petition to condemn alleges every essential requirement of G. S. 115-85 (125).

The petitioners admit that negotiations for the purchase and sale of the lands in question were unsuccessfully undertaken and that the respondents have been unable to acquire said lands from the petitioners by gift or by purchase. They further admit that the respondents have determined that the lands are necessary for school purposes and are the only lands suitable as a site therefor and alleged in their answer that such determination is unreasonable, capricious, and arbitrary, and further alleged that other suitable sites exist within the Administrative Unit. (See Record in State Court, pages 41, 42, and 11.)

In their answer and their exceptions to the report of the appraisers the petitioners seek to establish as a defense to the right of the respondents to condemn their lands the

invalidity of school bonds authorized by majority vote of the voters in the school district in which the lands are situated. They assert that at the time a special election was called and held that the constitution of North Carolina made mandatory the teaching of children of the white race and the children of the colored race in separate schools; that the Supreme Court of the United States in *Brown* v. *Board of Education*, 347 U. S. 483, held that such requirements were in violation of the Federal Constitution and that, therefore, neither integrated nor segregated schools can be operated by the respondents and that the proceeds of said bonds cannot be used as payment for the condemnation price of their lands. *Record, State Court*, page 10.

The special election for said school bonds was authorized by Chapter 1162 of the 1953 Session Laws of North Carolina, was called on April 20, 1954, and was held June 8, 1954. No reference was made in the bond proceedings to separate schools for the white and colored races. A majority of the voters of the Administrative Unit approved the issuance of $1,250,000.00 School Bonds, and the bond order called for the issuance of bonds for the purpose of "acquiring, erecting, enlarging, altering, equipping school buildings, including gymnasiums, agricultural buildings, shops, school cafeterias, and other necessary buildings, and of purchasing sites in the Albemarle Administrative Unit."

The trial court ruled that the petitioners could not in this action raise the questions sought to be raised in their further answer.

The matter was tried before the Judge and a Jury on the question of the amount of damages and compensation to which the petitioners were entitled, and appeal was taken to the Supreme Court of North Carolina, which Court found no error in the trial court proceedings. *Brown* v. *Doby*, 244 N. C. 746.

While the condemnation proceeding was pending in the Superior Court of Stanly County, North Carolina, the petitioners commenced an action in the United States District Court for the Middle District of North Carolina, seeking to enjoin the respondents from proceeding with the action in the State Court for all of the reasons which they now set out in their Petition for Writ of Certiorari as a basis for invoking the jurisdiction of this Court. The District Judge held that no grounds for invoking the jurisdiction of the Federal Court had been pleaded, and from that judgment appeal was taken to the United States Circuit Court of Appeals for the Fourth Circuit.* The Circuit Court of Appeals affirmed the decision of the District Court, and the petitioners filed Petition for Certiorari in that action to the Supreme Court of the United States, and the Petition was denied. *Doby* v. *Brown, Cert. denied,* 77 S. Ct. Adv. Op. No. 1, page 57.

The condemnation proceedings were instituted pursuant to G. S. 115-85 (now 125), and Chapter 1162 of the North Carolina Session Laws of 1953 is not in any respect related to the authority and power of the respondents to condemn lands for school sites.

I

ARGUMENT

No federal question is involved and no questions of importance are presented which it is in the public interest to have decided by this Court.

A careful perusal of the record in the State Court discloses that in no manner did the petitioners raise any federal question.

It is elementary that a substantial federal question must

* The decisions of the Courts are not reported in the Federal Reporter system.

be involved and timely and properly raised to invoke the jurisdiction of this Court. Likewise, the character of the federal question involved in a case is a criterion of the Court's jurisdiction to review; and if the federal question is insubstantial, the Supreme Court will not take jurisdiction. The rule that the character of the question involved goes to the jurisdiction to review finds expression in the Opinion of Mr. Chief Justice White in *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 23 S. Ct. 123, 47 L. Ed. 190, where it was held that "the doctrine . . . is that although . . . it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, it is so absolutely devoid of merit as to be frivolous," and the writ will not be granted. *Consolidated Turnpike Co. et al.* v. *Norfolk & Oceanview Railroad Co.*, 228 U.S. 596, 33 S. Ct. 605, 57 L. Ed. 982. *Stewart* v. *Kansas City*, 239 U.S. 14, 36 S. Ct. 15, 60 L. Ed 120. *Quong Ham Wah Co.* v. *Industrial Accident Commission of California*, 255 U.S. 445, 41 S. Ct. 373, 65 L. Ed. 723. *Wick* v. *Chelan Electric Co.*, 280 U.S. 108, 50 S. Ct. 41, 74 L. Ed. 212.

Mere allegation of a federal question will not suffice. *Atlantic Refining Co.* v. *Virginia*, 302 U.S. 25, 58 S. Ct. 75, 82 L. Ed. 2. However, nowhere in the record is there even a bare allegation that a federal question is involved.

We believe that the Court's general attitude toward petitions for certiorari in cases of this kind is established by the cases hereinafter cited and quoted.

Mr. Justice Frankfurter, in his concurring opinion in *Wilkerson* v. *McCarthy*, 336 U.S. 53, 69 S. Ct. 413, succinctly, but comprehensively, sets forth the Rule as follows:

> "Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper

> disposition of such cases demands, I do not think we should take cases merely to review facts already canvassed by two and sometimes three courts, even though those facts may have been erroneously appraised. . . . For this Court to take a case which turns merely on such an appraisal of evidence, however much hardship in the fallible application of an archaic system of compensation for injuries to railroad employees may touch our private sympathy, is to deny due regard to the considerations which led the Court to ask and Congress to give the power to control the Court's docket. Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough. It has been our practice to dismiss a writ of certiorari even after it was granted, where argument exposed a want of conflict or revealed that the case involved no more than its particular facts."

In *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U.S. 430, 70 S. Ct. 225, 94 L. Ed. 236, at page 243, it was stated in a concurring opinion:

> "I would therefore dismiss the writ as improvidently granted. By not doing so, the Court encourages petitions of this character instead of discouraging them. The Court should save its energy for cases it necessarily must adjudicate in order to adjudicate them with due regard for the needs of the deliberative process. The only effective way to respect these considerations is to cease acquiescence in their disregard."

In *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 43 S. Ct. 422, 67 L. Ed. 712, at 714, Mr. Chief Justice Taft said:

" . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

Also, in *Magnum Import Company* v. *Coty*, 262 U.S. 159, 67 L. Ed. 922, at page 924, the Court stated:

"The jurisdiction to bring up cases by certiorari from the circuit courts of appeal was given for two purposes, first to secure uniformity of decision between these courts in the nine circuits, and second, to bring up cases involving question of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

II

Questions raised involve only the state constitution and laws passed on by the state court adversely to the claim of the petitioners herein.

The condemnation proceeding in the State Court was commenced in 1954 pursuant to the provisions of G. S. 115-85 (now 125) and this statute was amended effective May 26, 1955, to the effect that where it does not provide the procedure to be followed the statute on eminent domain, G. S. 40-1, *et seq*, applies.

One of the reasons assigned in the petition for allowance

of the Writ is that the appraisers appointed by the Court did not give the petitioners ten days notice of the meeting to value and appraise the lands as required of commissioners appointed under the law relating to eminent domain, and that such failure deprives them of due process of the law and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

In the first place, the petitioners did not raise this question in the State Court in the sense that the failure of notice constituted any violations of their rights under the Federal Constitution. Such allegations made for the first time by the petitioners in their request for Writ of Certiorari comes too late, even if it involved a substantial federal question. *Mutual Life Insurance Company* v. *McGrew,* 188 U.S. 291, 23 S. Ct. 375, 47 L. Ed. 480. *Memphis Natural Gas Co.* v. *Beeler,* 315 U.S. 657, 62 S. Ct. 869, 86 L. Ed. 1090. *Bailey* v. *Anderson,* 326 U.S. 203, 66 S. Ct. 68, 90 L. Ed. 3. *Williams* v. *Georgia,* 349 U.S. 407, 75 S. Ct. 832, 99 L. Ed. 1193.

In the second place, G. S. 115-125 sets out clearly the duty of the appraisers and allows an aggrieved party to appeal to the Court and have his damages assessed by a jury upon both allegation and proof as to damages. This statute meets the requirements both of just compensation and due process of law under the Fourteenth Amendment to the Constitution of the United States. *Abernathy* v. *Railroad,* 150 N. C. 97. *City of Oakland* v. *United States,* 124 F. 2d 959. *Hanson Lumber Co.* v. *United States,* 261 U.S. 581. *Board of Education* v. *Allen,* 243 N. C. 520.

In *Board of Education* v. *Allen, supra,* where the plaintiff had given the defendant no notice except that provided in G. S. 115-125, the Court held that the respondents had "been given due and proper notice as required by law that the machinery to take their property for public school use and to fix and establish the 'just compensation' they

are to receive therefor has been set in motion" and remanded the proceeding to the clerk "that he may proceed to appoint appraisers to lay off the lands selected by the petitioners by metes and bounds, assess the fair value thereof and make their report in writing. After the appraisers have filed their report in writing the respondents may file exceptions thereto. . . ."

G. S. 115-125 provides that the appraisers shall make their report in writing to the Court within five days of their appointment. This being so, how then could G. S. 40-17 be applicable? Such contention in the light of reason is ridiculous and absurd. It is frivolous and void of merit.

The second reason assigned by the petitioners why the Writ should be granted is that they were not permitted to offer evidence that there were suitable sites for the school plant other than their lands, claiming that this denial was in violation of the due process and equal protection of the law clauses of the Federal Constitution. Again attention is directed to the Court that no such claim was made in the State Court and they may not now for the first time make such claim. Furthermore, they do not give the Court the benefit of what the Supreme Court of North Carolina has held in regard to school boards selecting property as the only suitable site for school buildings.

In *Brown* v. *Candler,* 236 N. C. 576, the Court said:

> "The additional circumstance that there are satisfactory sites for the new school house at other places does not disprove the soundness of the decision on the present phase of the litigation. Indeed, it illustrates the necessity for legislation vesting in the school authorities the discretionary power to determine which one of the various available sites is to be used."

The third reason assigned by the petitioners for allowance of the Writ is that respondents should not be allowed

to condemn their lands and pay the condemnation price from the proceeds of bonds voted at an election called prior to, and held after, the United States Supreme Court decision in *Brown* v. *Board of Education, supra.* They argue that the proceeds of said bonds cannot be used for school purposes, since, at the time that the statute under which the election was called was enacted, the Constitution of North Carolina contained a provision that the children of the white race and the children of the colored race should be taught in separate schools; that only segregated schools can be operated under the laws of North Carolina and that only integrated schools are permitted under the Brown decision.

The Rule of the Segregation Cases is inapplicable. These cases did not hold that public school funds used in the construction and maintenance of public schools attended only by white pupils would be unconstitutional. They did not hold that only integrated schools were constitutional. It may be that there are localities where the colored people will elect to attend a school wherein only their race is taught and it may well be that there are localities and school districts in which no colored people reside. Such being the case, it would not follow under the Segregation Cases that because no colored people were enrolled in a school so situated none could be operated for the whites.

The Segregation Cases simply held that to deny an individual otherwise qualified for admission to the public schools that right on account of race or color abridged the rights guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. The petitioners do not qualify themselves to invoke the Rule.

Chapter 1372, 1955 Session Laws of North Carolina, effective the 26th day of May, 1955, rewrote the entire statutory law relating to public education and no reference is

made therein in any respect as to the separation of the races.

Thus, on June 4, 1954, when the bond election was held, the decision of the Segregation Cases had been announced for almost one month. Therefore, it must be presumed that the people knew the law as announced in the Brown Decision and by the General Assembly of North Carolina.

Furthermore, in proceedings to condemn land the owners thereof may not under the North Carolina law set up as a defense thereto the invalidity of bonds the proceeds of which are to be used to pay the condemnation price. Such would be a collateral attack on the bonds which the State Court does not sanction. *White* v. *Lane,* 153 N. C. 14; *Banks* v. *Lane,* 171 N. C. 505. And there is no legal relationship between respondents' right to condemn petitioners lands and their right to use the proceeds of the bonds in payment of the condemnation price.

It must be kept in mind that the question here does not involve a change of purpose for which the bonds were issued, because they were issued for erecting plants and acquiring sites in the Albemarle City Administrative Unit, and that is the purpose for which the proceeds thereof are being used. However, the laws of North Carolina permit re-allocation of the proceeds from the sale of bonds for purposes other than specified in the bond order so long as the general purpose is not violated. *Mauldin* v. *McAden,* 234 N. C. 501. *Parker* v. *Anson County,* 237 N. C. 78. *Atkins* v. *McAden,* 229 N. C. 752.

It sufficeth to say that controlling on the question of the validity of the bonds in so far as affected by the Segregation Cases, is the decision of the Supreme Court of North Carolina in *Constantian* v. *Anson County,* 244 N. C. 221. The *Constantian* case was taxpayers' action to enjoin the defendant from issuing and selling capital outlay school bonds on the grounds that the decisions of the Seg-

regation Cases had invalidated them. In a very learned and lucid opinion written by *Justice Bobbitt,* the Court said:

> "We come now to the contention upon which plaintiff places major emphasis. It is this: When the bonds were authorized, Article IX, Section 2, as construed by this Court, contained the *mandatory requirement* that children of the white race and children of the colored race be taught in separate schools. *Puitt* v. *Commissioners,* 94 N. C. 709; *Lowery* v. *School Trustees, supra.* Moreover, the validity of such mandatory requirements had the sanction of decisions of the Supreme Court of the United States; for, as late as 1927, Chief Justice Taft, speaking for a unanimous Court, had explicitly declared that each state had the right and discretion to determine, in respect of its public school system, whether the children of different races should be taught in the same or separate schools, 'the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution.' *Gong Lum* v. *Rice,* 275 U. S. 78, 72 L. Ed. 172, 48 S. Ct. 91. However, in 1954, the Supreme Court of the United States declared that the *enforced* separation of Negroes and whites in public schools *solely on the basis of race* denied to Negroes equal protection of the laws (*Brown* v. *Board of Education of Topeka,* 347 U. S. 483, 98 L. Ed. 873, 74 S. Ct. 686, 38 A L R 2d 1180), and in its 1955 decision applied the proposition so declared to the cases before it (*Brown* v. *Board of Education of Topeka,* 349 U. S. 294, 99 L. Ed. 1083, 75 S. Ct. 753). The bonds were authorized when it was contemplated that children of the white race and chil-

dren of the colored race would be taught in separate schools in compliance with Article IX, section 2, and not otherwise. Hence, the argument runs,—both the bond order and the election were invalidated by the unprecedented action of the Supreme Court of the United States; for, plaintiff insists, if the school authorities cannot operate the schools in compliance with Article IX, section 2, there is no authority to provide additional school plant facilities when no lawful use thereof can be made for school purposes.

"The Fourteenth Amendment to the Constitution of the United States provides, in part, that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' The limitation is upon the exercise of governmental power by a state or state agency. This is well settled and fundamental.

"No provision of the Constitution requires that a state maintain a system of public schools, whether attendance be compulsory or voluntary. This is exclusively a matter of state policy. Moreover, in respect of a state public school system, nothing in the *Brown* case requires that children of different races be taught in the same schools. The doctrine therein declared, to be put into effect in specific cases 'with deliberate speed' as conditions may warrant, is that no child, whatever his race, may be excluded from attending the school of his choice solely on the basis of race. If so excluded by the state or a state agency, he may assert his constitutional rights under the equal protection clause of the Fourteenth Amendment as interpreted in the *Brown* case. In substance, this is the interpretation placed upon the *Brown* case by the three-judge district court, composed of *Parker* and *Dobie*, Circuit Judges, and *Timmerman*, District Judge, upon rendering their decision 15 July 1955,

in *Briggs* v. *Elliott*, 132 F. Supp. 776. No one can now foretell in what localities or in what buildings or to what extent children of the white race and children of the colored race will be taught in the same public schools in North Carolina.

"The impact of the decisions in the *Brown* case, in respect to the *operation* of public schools in Anson County, applies equally to the school plant facilities existent prior to the bond order and election, the school plant facilities provided by the bonds sold ($500,000) and the school plant facilities to be provided by the proceeds from the sale of the unissued portion ($750,000) of the authorized issue of $1,250,000. In this respect, there is nothing distinctive about the uncompleted projects for which the bonds were authorized.

"If plaintiff's contention were adopted, all authorized (unissued) bonds for school plant facilities, as well as all previously authorized special tax supplements within administrative units, throughout the State, would be invalidated. Applicable legal principles impel the opposite conclusion.

"The mandate to the General Assembly (Article IX, Section 2), and the mandate to the board of commissioners of each county (Article IX, section 3), discussed above, were part and parcel of the original (unamended) Constitution of 1868. These are the constitutional mandates upon which our public school system is based. See, also, Constitution of North Carolina, Article I, section 27; Article IX, sections 1, 4, 5, 8, 9 and 11. It was the amendment of 1875 which provided that, in obeying the original mandates, a specific method was required, namely, that 'the children of the white race and the children of the colored race shall be

taught in separate public schools.' Only that portion of the 1875 amendment which purports to make *mandatory* the *enforced* separation of the races in the public schools is now held violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Otherwise, the mandates of Article IX, sections 2 and 3, remain in full force and effect. The provisions thereof, absent the mandatory requirement of enforced separation, are complete in themselves and capable of enforcement. Their separable and independent status is manifest. They antedate the 1875 amendment. They survive the invalidation of the mandatory requirement of enforced separation contained in the 1875 amendment.

"Now as in 1952, Article IX, section 2, is a mandate that the General Assembly provide for a State public school system. Now as in 1952, Article IX, section 3, is a mandate to the board of commissioners of each county in the State to provide the funds for the buildings and equipment necessary for the maintenance and operation of public schools within the county for minimum term.

" 'A statute may be valid in part and invalid in part. If the parts are independent, or separable, but not otherwise, the invalid part may be rejected and the valid part may stand, provided it is complete in itself and capable of enforcement.' 82 C.J.S., Statutes, sec. 92. Our decisions are in accord. *R. R.* v. *Reid*, 187 N.C. 320, 121 S.E. 534; *Lowery* v. *School Trustees*, supra. This well established rule applies equally when a portion of a state constitution or any provision thereof is invalid as violative of the Constitution of the United States.

"The final (contradictory) contention of plaintiff is that, assuming that teaching of children of the white

race and of the colored race in the same school is now permissible under the decision in the *Brown* case, the issuance of the bonds ($750,000) is for an unlawful purpose under North Carolina law. The fallacy underlying this contention is that the mandatory requirement as to enforced separation [of the races], incorporated in Article IX, section 2, by the 1875 amendment, is no longer the law in North Carolina.

"Our deep conviction is that the interpretation now placed on the Fourteenth Amendment, in relation to the right of a state to determine whether children of different races are to be taught in the same or separate public schools, cannot be reconciled with the intent of the framers and ratifiers of the Fourteenth Amendment, the actions of the Congress of the United States and of state legislatures, or the long and consistent judicial interpretation of the Fourteenth Amendment. However that may be, the Constitution of the United States takes precedence over the Constitution of North Carolina. Constitution of North Carolina, Article I, sections 3 and 5; Constitution of the United States, Article VI. In the interpretation of the Constitution of the United States, the Supreme Court of the United States is the final arbiter. Its decision in the *Brown* case is the law of the land and will remain so unless altered or reversed by constitutional means. Recognizing fully that its decision is authoritative in this jurisdiction, any provision of the Constitution or statutes of North Carolina in conflict therewith must be deemed invalid.

"The Florida Supreme Court, in *Board of Public Instruction* v. *State*, 75 So.2d 832, and the Supreme Court of Oklahoma, in *Matlock* v. *Board of County Commissioners*, 281 P. 2d 169, on similar but somewhat

variant factual situations, have reached conclusions generally in accord with the decision of this Court."

Judgments of the highest state court are conclusive as to construction and application of State statutes and Constitutions. *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229. *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 48 S. Ct. 423, 72 L. Ed. 770.

III

No federal question was raised by the petitioners in the state court, and the judgment of the state court was not based on a federal question.

The rule is well established that the Supreme Court of the United States will review a decision of a state court only when it affirmatively appears from the record that a federal question was presented to the highest state court having jurisdiction and that its decision on the federal question was necessary to a determination of the cause and when such decision might have been either on a state ground or a federal ground and the state ground is sufficient to support the judgment, the Court will not undertake to review it. *Mayo* v. *Florida*, 351 U. S. 277, 76 S.Ct. 8806. *Stembridge* v. *State of Georgia*, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130. *Buck* v. *People of the State of California*, 343 U. S. 306, 72 S. Ct. 502, 96 L. Ed. 554.

Thus, it is not enough that a federal question be presented to the State Court, it must appear that its decision was necessary to the determination of the cause and that if the State court did not expressly decide it, it must be clear that its judgment could not have been given without deciding it. *Crowell* v. *Randell*, 10 Pet. 368, 9 L. Ed. 458. *Southwestern Bell Telephone Co.* v. *Oklahoma, et al*, 303 U. S. 206, 58 S. Ct. 528, 82 L. Ed. 751. *Williams* v. *Kaiser*, 323 U. S. 471,

65 S.Ct. 363, 89 L. Ed. 398. *Wilson, et al* v. *Cook,* 327 U. S. 474, 66 S. Ct. 663, 90 L. Ed. 793.

The federal question must be raised by pleading, motion, exception, or action part, or being made a part, of the record showing that the claim was presented to the State Court. *Loeb* v. *Columbia Twp.,* 179 U. S. 472, 21 S. Ct. 174, 45 L.Ed. 280. *Hiawassie River P. Co.* v. *Carolina-Tennessee P. Co.,* 252 U. S. 341, 40 S. Ct. 330, 64 L. Ed. 601. It is not properly made when made for the first time in a petition for re-hearing after judgment, or in a petition for certiorari. *Sayword* v. *Denny,* 158 U. S. 180, 15 S. Ct. 777, 39 L. Ed. 941; *Zadig* v. *Baldwin,* 166 U. S. 488, 17 S. Ct. 639, 41 L. Ed. 1088; *Mutual Life Insurance Co.* v. *McGrew, supra; Memphis Natural Gas Co.* v. *Beeler, supra; Bailey* v. *Anderson, supra; Williams* v. *Georgia, supra.* Nor can a Brief in the State Court or argument there for the first time be relied on to establish that a federal question was raised. *Live Oak Water Users Ass'n* v. *California,* 269 U. S. 364, 46 S. Ct. 149, 70 L. Ed. 305.

Under no construction could the judgment of the State Court be predicated upon any federal question, because no such question was raised by the petitioners, and the Supreme Court of North Carolina considers no question not set out in exceptions and assignments of error to rulings of the trial court. *Davis* v. *Council,* 92 N. C. 731; *Lytle* v. *Lytle,* 94 N. C. 524; *Anthony* v. *Estes,* 99 N. C. 598; *Thornton* v. *Brady,* 100 N. C. 40; *Wallace Brothers* v. *Robeson,* 100 N. C. 210; *Pegram* v. *Hester,* 152 N. C. 765; *Smith* v. *Globe Home Furniture Mfg. Co.,* 151 N. C. 261; *Davis* v. *Duval,* 112 N. C. 834; *McKinnon* v. *Morris,* 104 N. C. 361; *In re: Bailey,* 180 N. C. 30. The petitioners did not carry up any exceptions or assignments of error to any ruling on the part of the trial court raising a federal question.

IV

Decisions relied on by the petitioners here are inapplicable in this cause and do not establish a right to the granting of the Writ.

The petitioners cite *Board of Education* v. *Allen,* 243 N. C. 520; *Collins* v. *Highway Commission,* 237 N. C. 277; *Gatlin* v. *Highway Commission,* 245 N. C. 66; *Shelley* v. *Kraemer,* 334 U.S. 1; *Constantian* v. *Anson County,* 244 N. C. 221; *Crampton* v. *Zabriskie,* 101 U. S. 601; *Parker* v. *Anson County,* 237 N. C. 76; *Waldrop* v. *Hodges,* 230 N. C. 370; *Gore* v. *Columbus County,* 232 N. C. 636.

Board of Education v. *Allen, supra,* is no authority for the petitioners' position that they were entitled to notice of the meeting of the appraisers. In fact, this case militates against any such conclusion in that it holds that the only notice that the petitioners were entitled to before the appointment of the appraisers and their assessment of damages is the notice of five days before application for the appointment of the appraisers is filed.

Collins v. *Highway, supra,* and *Gatlin* v. *Highway, supra,* involve condemnation proceedings under G. S. 40-1, *et seq.* Proceedings under this Chapter are quite different from proceedings under G. S. 115-125, which deals only with condemnation proceedings relating to school sites. The former specifically provides for a special proceeding with petition, summons, and answer, and commissioners appointed thereunder are required to give notice of their meeting to the parties litigant and to hear their proofs and allegations. The latter makes no such provisions.

Shelley v. *Kraemer, supra,* involves civil rights under the Federal Constitution in instances where deeds contain restrictive covenants against people of different races, and in no respect is that case applicable here.

In *Constantian* v. *Anson County, supra*, the North Carolina Supreme Court held exactly opposite from the contention the petitioners make here, and it is not understood how, in any sense, that case could be interpreted as supporting any reason for the allowance of the Petition for Writ of Certiorari.

Crampton v. *Zabriskie, supra*, deals with the right of taxpayers in regard to illegal disposition of moneys belonging to a county for the illegal creation of a debt which they and others may be compelled to pay. Certainly, this is no authority for any position taken by the petitioners, because there is not involved any illegal disposition of moneys or the illegal creation of a debt. It is admitted by all parties that the bond moneys are to be spent for schools to be attended by such pupils as are entitled to attend under the laws of the land. Such expenditure meets all the requirements of both the State and Federal Constitution.

Parker v. *Anson County, supra; Waldrop* v. *Hodges, supra; Gore* v. *Columbus County, supra*, deal with the question of the use of proceeds of bonds for purposes other than those for which they were specifically voted. The proceeds of the bond moneys in the instant case are to be used for the identical purposes for which they were approved by vote of the people and purposes for which they must be used under the State Constitution and laws.

Conclusion

The petitioners do not think that any of their rights under the Federal Constitution have been violated in the condemnation proceedings. That becomes crystal clear when one is faced with their admission that they would sell the lands in question if they could obtain their price. Rather, they here seek to continue their premeditated course of delay, hoping that thereby they may cause the respondents to abandon their efforts to perform that which is made incum-

bent upon them by the laws of North Carolina. Certainly, the Supreme Court of the United States is not a tribunal to give ear to such complaints.

The reasons assigned and relied on by the petitioners neither warrant nor impel the granting of the Writ here sought. In fact, no rights of petitioners guaranteed by the Constitution of the United States have been violated. Hence, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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